

F. O. MIGNON, JR.

IN THE
UNITED STATES
CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES,"
Etc.,

Appellee.

No.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

DANIEL LANDON,

Proctor for Appellant.

1054-55 Empire Building, Seattle, Wash.

STATEMENT

It is contended by Gust Fondahn, the appellant herein, that after he was injured, the captain of the Schooner "C. S. Holmes," appellee herein, did not provide medical and surgical treatment and that as a result his arm, the bones of which were broken, decayed, rendering the same useless.

When the case was before this court before, it was upon an appeal from the lower court's order sustaining the exceptions to the amended libel. The lower court's decision is found in *Fondahn v. Schooner "C. S. Holmes"*, 212 Fed. Rep. 525. This court reversed the lower court on the question involved here, in *Fondahn v. Schooner "C. S. Holmes,"* 220 Fed. Rep. 273. The appellee then answered by general denial and set up an affirmative defense. No evidence having been offered pertaining to appellee's affirmative defense, so that the issues as formed in the lower court were upon the amended libel and appellee's general denial. The testimony was taken before the U. S. Commissioner, transcribed, and filed with the court and the court from the testimony found for the appellee upon the issues herein appealed from (Record, p. 159 to p. 166).

Gust Fondahn, appellant herein, signed on board the Schooner "C. S. Holmes" during the month of December, 1912, for a voyage from San Francisco,

California to Everett, Washington and return. The schooner was loaded for her return voyage with a cargo consisting of lumber and piling, at Everett.

On January 3rd, 1913, after some delay by reason of high winds, the Tug "Goliah" towed the "Holmes" out from Neah Bay to the Ocean. When they got her to the open seas, the captain of the "Holmes" gave orders to cut the lashing loose that held the wire, or tow line, and this appellant responded to the order; in doing so he was struck by the wire, causing a compound fracture of his right arm and paralyzing and bruising his side. The accident occurred about the hour of 7 o'clock P. M. on the 3rd day of January, 1913.

The captain of the "Holmes" gave orders to go back to Port Angeles. The appellant requested the captain to take him direct to Port Townsend, where the Marine Hospital was located. The captain informed the appellant that it would cost \$100 more to do so. On the return voyage, the captain asked the captains of other vessels if there was a doctor in Port Angeles and they informed him that there was. Prior to the time they arrived in Port Angeles, the appellant again requested him to take him to the Marine Hospital at Port Townsend. The captain again refused to do so.

The "Holmes" was towed into Port Angeles about the hour of 3 o'clock A. M., and the captain and

crew "turned to" until about the hour of 7 o'clock in the morning, when the captain took the appellant ashore and made inquiries in Port Angeles for a doctor and was directed to Dr. Taylor by a police officer of that city. The captain gave Dr. Taylor a permit which would entitle appellant to be admitted at the Marine Hospital at Port Townsend, and represented to him that that permit would be good for his services and expenses incurred. The doctor questioned the permit, but the captain then told him that the appellant was in the doctor's charge and off from the captain's hands.

After some discussion and delay the appellant was finally taken to the hospital, out about a mile and a half from the office of Dr. Taylor, and at 11 o'clock in the presence of the captain, appellant's arm was cleaned and temporarily bandaged and from that time on until the 11th of the month, some seven days, no further treatment was received.

Some two days after arriving at the hospital, an X-ray photograph was taken of the arm and it was disclosed that the bones were out of position. Shortly after arriving at the hospital, blood-poisoning set in and by the time he arrived at Port Townsend, the life had been eaten out of the tissues of his arm, and a large amount of puss had formed during the time he was in Port Angeles.

While appellant was at Port Angeles, Dr. Taylor

several times requested the appellant to proceed to Port Townsend but the appellant's physical condition was such that he could not do so until he had been there seven days. When the appellant left he paid Dr. Taylor the sum of \$30.00, that being the usual charge for hospital fees and incident thereto, but did not include any charges for operation or surgical treatment. No charge was made, none having been had.

When the appellant left Port Angeles, Dr. Taylor gave him a letter addressed to the Marine Hospital at Port Townsend, informing him that appellant had been left off at Port Angeles from the "C. S. Holmes" and came under his care and that he had no arrangements for that class of cases and that as soon as it was possible he had moved him and that he had taken an X-ray photograph of the injury, which showed that the bones could not be gotten in place without plating.

The appellant upon his arrival at Port Townsend, immediately received attention from the physicians and surgeons in charge of the hospital and after fourteen days of treatment the infection subsided sufficiently to attempt to set the bones, but as it had been neglected at Port Angeles, the tissues were dead and the ends of the bones decayed so the plates, as will be seen by the exhibits, would not hold the arm in place, resulting in the appellant having

an arm that is entirely useless.

ARGUMENT

We believe it will be seen from the evidence that the findings of the District Court are not borne out by the testimony, and that the allegations of the libel are enlarged substantially and fully proven.

It appears more convenient if we take the assignment of errors, and the testimony, in sections, and argue from that basis.

Assignment of Error No. 2.—“The court erred in finding that the master discharged his duty toward the appellant prior to the time he was put ashore at Port Angeles.” (Record, p. 171).

It will be seen from the evidence that the appellant did not contribute to his injuries and was doing his full duty in fearlessly obeying the orders of the captain, when injured.

At the time of the injury, appellant testified, that the captain was standing about 4 feet above him and about 8 feet away, talking to him, where he could see everything going on, and that appellant asked the captain how the wire was over the bow,—that the appellant could not see—and that he told him that the wire was slack and he said everything was alright to let go.

Mr. Hulst, a member of the crew and a witness

for appellant, testified that the captain had ordered them to let go of the cable. That the appellant had obeyed the orders of the captain and that the rest of the crew were afraid to go down, there being a high sea and the water was coming over all the time and that the appellant cut the lashing and jumped away, but did not get far enough away when the cable struck him.

The captain testified: "I told him to be careful and get out of the way after he cut the lashing loose—to get out of the way and run; he did run, but he did not, quick enough."

When the captain gave orders to go back to Port Angeles, the appellant testified that he asked the captain why he went to Port Angeles as they had the whole night to go to Port Townsend and the captain told him it would be too much expense, that it would cost one hundred dollars; that there was a marine doctor in Port Angeles.

Ludvig Hulst, a seaman and a witness for the appellant, testified as to what happened after the appellant was injured. His testimony is clear and concise and corroborated by the appellant and we venture to say that it is doubtlessly true in every particular and we are taking the liberty to set it out in material part, it being as follows:

"The captain went to the deck and put the

boat about, put the vessel around again to go in. When the captain went around, he came down again, and Gust says where are you going, captain? And the captain says I guess I will go to Port Angeles, there is a doctor in there. Gust says, why don't you go and take me right up to Port Townsend, so that I could get in the hospital and everything would be clear. After while the captain says I don't want to go up there, it would cost me a hundred dollars more. Of course he didn't say nothing more then, he was almost all in, and I was washing his arm and everything. And I asked the captain for something to bandage to put around his arm and the captain didn't have none, so Gust he had some small cloths in a kind of sewing bag and I got hold of that and I put that around his arm. And I put some papers on and the bandage around. And we went in to Neah Bay. And the big tug that took us out came out and asked our captain what was the matter. And the captain says we got a man badly hurt. He says where do you want to go now? And the captain says I want to go to Port Angeles. Well, he says, I can take you up there if you want. No, says the captain, you are too big for us; I don't want you but you can have the "Prosper" come and let her take us up, she is a smaller boat, she is not got so big a cable, and the "Prosper" came out and told our captain to lower down the sail and asked us if he wanted to go to Angeles, and he says yes, I want to go to Angeles, there is a doctor there? And

the captain of the "Prosper" said yes, there is a doctor there in Angeles. Well, we came up, I could not say exactly the time, but I suppose it was a little before three or a little after three in the morning when we came to Port Angeles. We just lowered down the sail and we all went in to bed to sleep until daylight. As soon as daylight we got up and had breakfast and the tug boat came alongside, and they took Gust on shore, and what happened after he got ashore I do not know.

"Q. Now, did you ever have any conversation with the captain of the C. S. Holmes?

A. I had when we came out to sea again.

Q. What was that conversation?

A. I asked him how Gust was getting along, and the captain says, he is all right, the doctor told me there was just a clean break, just broke clean off and it would be all right pretty soon. That is what he told me and I said to him one day, that doctor in Port Angeles is not a marine doctor. Well, the captain says, I don't think he is, but he is just as well off there as he would be anywhere else. But the captain knowed there was no marine doctor there, and knew that before we went in. (Record, p. 32 to p. 34)

The testimony shows that they had a favorable tide and a fair wind on the return. The captain testified that the reason he went to Port Angeles

was because he was going to the nearest doctor and that the captains of the "Goliah" and the tug "Prosper" had informed him that there was a marine doctor at Port Angeles.

The captain on cross examination testified that after he had anchored at Port Angeles, that the libelant had asked him to go to Port Townsend and that he had said in reply that it would be an unnecessary expense to do so. It would seem that if any further proof was necessary to convince the court that it was a matter of expense that caused the captain to decide to go to Port Angeles, it was given by the captain himself, on cross-examination. It being as follows:

"Q. What excuse have you to give for not going to Port Townsend?

A. I went to the nearest doctor.

Q. What was the excuse you gave at that time?

A. To go to the nearest doctor.

Q. What was the excuse you gave. You just testified that you told him it would cost a hundred dollars more?

A. That was a side issue, a side remark.

Q. It was a side issue?

A. It was at the time.

Q. You mentioned the side issue rather than the main one?

A. I did at the time, sure I did, I will admit that." (Record, p. 85).

The appellant in obedience to the order of the master of the ship, had done that which others of the crew were afraid to do. He had gone so to speak "into the jaws of death." And while still writhing in pain and doubtlessly, despairing of his life, he had simply requested that he be taken to Port Townsend and still in face of these facts, the captain now contends that he did not give the real reason for going to Port Angeles.

In the ordinary course of events, the appellant would have obtained treatment as soon, if not sooner at Port Townsend than he would at Port Angeles.

A fair deduction of the testimony will disclose the fact that they arrived in Port Angeles at about the hour of 3 o'clock A. M.; that they lowered down the sails and they all went to bed and slept until daylight, (the time of the year being January 4th), until around 7 o'clock, probably between 7 and 8. Then he was taken to Dr. Taylor's office and later removed to the hospital, receiving no medical aid until between 10 and 11 o'clock that morning. To have gone to Port Townsend would not have taken them any longer than 9 o'clock at the most.

Surely as much, if not more, argument can be advanced that it was reasonable to suppose that the injured man would have received as quick treatment at Port Townsend as he would have at Port Angeles so that any contention upon the part of the appellee in this regard is nothing more nor less than a poor excuse, having absolutely no merit in law or in fact.

Assignment of Error No. 1—"The court erred in finding that the master discharged his duty towards the libelant in offering him proper medical attendance." (Record, p. 17).

Gust Fondahn, the appellant, testified:

"The captain took me up to Dr. Taylor, Taylor Brothers, which I found out was no marine doctor. The captain wrote out a hospital permit for me. This permit is only good for me to be accepted in the marine hospital at Port Townsend. The captain says here is a paper doctor, to send him to the Marine Hospital at Port Townsend; and all you have to do for him, and that will square all your expenses. After a minute the doctor asked the captain, he says, I want you to explain this piece of paper. The captain told him, I have got nothing to explain, the man is in your care now and he is out of my hands. After that they took me up to the doctor's hospital and I got chloroformed, and they tried to fix my arm temporarily, as far as I knew. I got out of the chloroform and I

recollect the captain was there. But I would not be responsible to give evidence as to what happened. Well, two days after I was in bed, I was helpless, could not get up. The doctor came in the morning and piled my clothes there and wanted to know if I could get up off the bed. I told him no, doctor, it is impossible, I cannot move. I says what is the matter, doctor, anything going wrong? He says no, and he went out. And I spoke to his brother the same day in the afternoon and he told me the truth, he says we find out that the captain gave us a false statement about this piece of paper, and we can get no money from the Marine Hospital, and the sooner you get out of bed it will be cheaper for you. I explained to the doctor that by the marine law I was allowed to get a doctor and hospital and medical attendance. He said I don't know nothing about that, for to clear ourselves we will have to look for the pay from you. Well, I was thinking about my arm. I could not get no more treatment, and I considered it best to get up as quick as possible. I asked the doctor, in case I got well enough to get up, how much the bill would be, and the doctor told me he would make it cheap under the circumstances, we will only charge you thirty dollars. I told the doctor I would put the money up but I would not pay the bill. I got a receipt for the money. On a Saturday, eight days afterwards, the nurse helped me up and get on my legs. I was able to walk around in there, but I could not sit down. I got to the hospital, to the

Marine Hospital, and the doctor asked me why I did not come there first. He says your arm is in such shape that I could not do anything with you. My arm was all festered. It took two months and five days before they could set my arm, before my arm was in condition to set. The first week I came to the Marine Hospital they took an X-ray picture of my arm, and the fore-bone had overlapped—

MR. SHORTS: I object as not the best evidence.

Q. Did you turn those X-ray pictures over to me?

A. You have them, yes; I turned them over with all my papers.

MR. LANDON: I will produce the picture later.

Q. You may continue now.

A. The bone was overlapped and the arm contracted and it was about an inch shorter. And on the 8th of March I got operated on and they plated my arm bones together, and the arm was in such shape and so contracted the plate wont stand. The joints of the bone cave in. And the doctors themselves think there is a cave-in in one bone—

MR. SHORTS: I object to any statement as to what the doctors may think. The best

evidence would be the doctors themselves. I move to strike the statement and object to any further testimony along that line.

Q. What did they do to you?

A. The doctors?

Q. Yes.

A. They operated on me. They put plates in, silver plates. And the arm was contracted in such shape it would not stand it; it broke loose again and caved in.

Q. What did they do then?

A. It has been there ever since. I was in perfect physical health, for the abraisions healed up in eight days; there is nothing against me. I blamed the captain—

Q. You are still in the hospital there?

A. I am still there. From the 10th day of January. I got hurt the 3rd of January.

Q. Can you use your arm at the present time?

A. My arm for labor is permanently useless. I cannot lift nothing with it.

Q. How old are you?

A. Forty-one past, very near forty-two.

Q. What occupation have you been following?

A. Been going to sea all my life.

Q. And what wages were you earning?

A. Forty-five dollars a month.

Q. Including board on the vessel, of course?

A. Yes. I want to add that I wrote twice down to San Francisco—

Q. What correspondence, if any, have you had with the owners of the ship?

A. There was through the Union a man representing me to the owners, Mr. Tennyson representing the ship's owners. The man who was representing me in Port Townsend was Miller. I was helpless, I could not write; as far as that goes I could not write yet.

Q. Did you see the letters?

A. He showed me the letters, and told me that Tennyson was the representative of the ship.

Q. Go ahead.

A. The doctor in Port Angeles he sent a letter to me and told me he wrote to the captain and explained the case to him. I never got the money. But he promised, on one condition, if I wanted to sign an agreement not to prosecute them and to get two witnesses to sign, and he gave me a typewritten sheet of paper to that

effect. That is about all of my statement.”
(Record, p 20 to p. 24).

Captain Thompson’s testimony:

“Q. Now what time did you get to the doctor’s office, do you think, captain?

A. It was probably about eight o’clock, as near as I can remember, between eight and nine. I did not take the time. I know we had to wait a little while before he came.

Q. How did you get up there?

A. Walked up there.

Q. All of you walked?

A. Yes.

Q. And was the doctor at his office when you got there?

A. No, I guess we met him on the street.

Q. On the way up to the office?

A. Yes.

Q. And he turned around and walked back with you?

A. That is something that I really do not remember how it happened, where we did meet the doctor. I guess we did meet him on the street. I know the officer from the Snohomish

introduced me to the doctor, but whether it was on the street or not I do not remember that. That is something I cannot swear to.

Q. Well, what did you say to the doctor?

A. When we got to his office we had quite a talk. I asked him if he was a marine doctor and he said yes, he handled the marine cases.

Q. What did you say about Mr. Fondahn being hurt there?

A. I told him that the man had his arm broke and I had tried to fix it up myself in the evening, but it was now about fourteen hours after the accident happened and needed attendance, and of course asked him if he was a marine doctor and he said yes. I had a hospital permit and wrote it out at his desk, and I asked him if he would accept that and he said yes.

Q. And did you turn the permit that you made out, over to this doctor?

A. Right there, right in his office.

Q. Did he seem to know what it was? Did he ask any questions about it?

A. I took it for granted that he knew what it was. He did not ask any questions about it at all. I advised him to communicate with the hospital people in Port Townsend regarding the man, because he could walk at the time, and he could go right aboard some steamer for Port

Townsend that same day if the doctor would say so.

Q. Now what, if anything, was said by him about pay for his services in taking care of the man?

A. There was not a word said about payment at all.

Q. He took the permit you made out?

A. He took the permit I made out, and I told him that the man is now in your care.

Q. What did he say?

A. He said that is all right.

Q. What did the doctor do with him then??

A. He took him to the hospital, he and his brother has a hospital there.

Q. At Port Angeles?

A. Yes, it is customary in small places, where there is no regular marine hospital, the government has a ward in a private hospital.

Q. They took him up to this private hospital, did they?

A. Yes, sir.

Q. Did you go up to the hospital yourself to see him?

A. I went out afterwards.

Q. What time, captain?

A. About twelve o'clock.

Q. The same day?

A. The same day.

Q. Did you see Fondahn there in the hospital?

A. Yes.

Q. What condition was he in when you saw him?

A. He seemed quite happy; he had his arm all fixed, lying in bed. I had quite a long talk with him.

Q. Did the doctor say anything to you about paying for his services in taking care of the injured seaman?

A. Not a word.

Q. How long did you stay at the hospital?

A. Oh, probably half an hour.

Q. Did you pay Mr. Fondahn for his wages?

A. I did, right there.

Q. Paid him off in full there, did you?

A. Yes, right there.

Q. Well, then what did you do?

A. Then I went back to attend to my business.

Q. Back to your ship and went to sea?

A. Went to sea the following day. I could not get a tow that day, I could not get a tug.

Q. Now I will ask you, captain, if this is your first experience of having men hurt aboard ship?

A. No, it is not the first. I have had lots of them.

Q. I will ask you if there are marine doctors in practically all of the ports on Puget Sound?

A. Well, there is only one marine hospital on Puget Sound, that is at Port Townsend, but there are doctors appointed as marine doctors to attend to marine patients. There is one right here in Seattle and there is in Tacoma. And I have had a case in Bellingham and in Tacoma both, where the same thing happened, where a private doctor acted as marine doctor, and he accepted the hospital permit, and puts the patient in a private hospital in which the government supplies a ward.

Q. And keeps them there how long?

A. I really don't know what the time is. It used to be sixty days. It was reduced to thirty. Now I do not know what it is. They will keep

a patient there longer if he is unable to move.

Q. Just what did they do with him.

A. Sent him to the marine hospital.

Q. Did you ever take any injured seaman of your crew on this vessel or any other vessel, to the marine doctor at Bellingham?

A. I did.

Q. Did you make out a permit just as you did in this case?

A. I did, sir.

Q. Did the doctor there accept it and treat him?

A. They did and that is all. I had a man with a broken leg up there one time.

Q. Have you done the same thing in any other ports?

A. Tacoma and in San Pedro several times.

MR. LANDON: I object as not the best evidence.

Q. Was there ever any doubt in your mind but what this doctor Taylor, that was his name, at Port Angeles, was a marine doctor?

MR. LANDON: I object as incompetent, irrelevant and immaterial.

A. There is no doubt at all. Of course the man told me so himself and this man was listening to it and could hear. (Referring to libellant.)

Q. What inquiry had you made as to whether there was a marine doctor in Port Angeles?

A. From the two tug captains, and that officer from the Snohomish, they all told me the same thing. I took that as a good guaranty from the character of the men I asked. And I asked the doctor point blank whether he was a marine doctor and he said yes.

Q. Now if he had told you that he was a private doctor, would you have made out the same certificate?

MR. LANDON: I renew my objection.

A. I might have made it out but would he have accepted it?

Q. What would you have done with him? If he had told you he was a private doctor?

A. I naturally would have had to offer to pay him or guarantee his payment for the man. He would ask for a guaranty. (Record, p. 77 to p. 82).

CROSS-EXAMINATION

Q. You remember distinctly, do you, of not having any controversy as to who would pay;

nothing said about that?

A. Not one word when he accepted that permit?

Q. He accepted that permit?

A. Yes, sir.

Q. And you remember that you asked him if he was a marine doctor?

A. Yes, sir.

Q. And he told you he was?

A. Yes.

Q. And he said nothing at all about the permit that you were giving him?

A. No, he accepted the permit. I says will you accept this and he says yes.

Q. What was that permit, allowing him to go where?

A. To a marine doctor.

Q. To a marine doctor, that permit was.

A. Yes. Any marine doctor will accept that permit.

Q. And after you had given him that permit you told him that he was off your hands? and on his hands?

A. Yes.

Q. How did that question happen to come up?

A. I told him that when I left there.

Q. Why did you volunteer that statement, if you did volunteer it?

A. I do not remember the circumstances.

Q. Was not the doctor questioning the validity of the permit and you told him that he was off from your hands and on to his, now was not that the way it came up?

A. No.

Q. There was nothing said?

A. Not that I remember, no.

Q. You are interested in this vessel, are you captain?

A. I was at the time.

Q. You still work for the company?

A. I do.

Q. Work for what company?

A. J. E. Billings." (Record, p. 86 to 87).

Dr. W. J. Taylor testified on direct examination that he met the captain and the libelant about 5 or 6 o'clock in the morning. (Record, p. 93).

Dr. W. J. Taylor further testified on direct examination as follows:

Q. What, if any, paper did the captain give you, doctor?

A. He gave me as custodian, for this sailor, a paper that was to admit him to the Marine Hospital.

Q. What did you do with that paper?

A. I put it in my desk, in a drawer I have there, and when the sailor left I gave it to him.

Q. That was Fondahn. When you say sailor you mean Fondahn?

A. Yes sir.

Q. You gave this paper to him?

A. I gave him the paper that he took with him.

Q. That is the one the captain gave you?

A. Yes, that the captain gave to me.

Q. Now, doctor, is it true that you asked the captain to explain to you what that paper meant?

A. Which, the permit?

Q. When the captain gave you this paper, this permit or whatever it was, did you ask

the captain to explain the paper to you?

A. I did not ask him to explain, that is ridiculous to talk that way. I knew what the paper was. I did not need to ask any explanation.

Q. The reason I ask you the question is because Fondahn has already testified in the case and has stated that you asked the captain to explain the paper. Did you ever make any such statement?

A. No sir. The paper was a permit to the hospital at Townsend. I knew what the paper was.

Q. Had you ever had any of them before?

A. I have seen them before, yes. Sailors have to have them when they go from the office.

Q. Now, Mr. Fondahn further states in his testimony that when you asked for an explanation, you said the captain said he had nothing to explain, this man is in your hands now and out of mine. Was any such statement made with reference to the explanation of the paper?

A. No, I do not think there was anything of that kind.

Q. Was there any time, doctor, that you refused or neglected to give this man treatment?

A. No sir.

Q. Was there any time while he was there that you insisted upon him getting out and going away from your place?

A. No sir, there was no time. He could stay as long as he liked, but I told him that he was to go to the Marine Hospital as soon as he was able to go he should go there because that was the place provided for him; that that was his permanent place, this was only temporary arrangement—mine was just temporary.

Q. Now, when the captain came to you, I will ask you whether or not he asked you if you did marine work or not?

A. There was something to that effect. He asked me if I was a marine doctor. When I told him no, that I had done emergency marine service. He asked me if I was a marine doctor and I said no, because I am not.

Q. Now what did you tell him then—I understand that you told him you did emergency marine work?

A. That I had done before this time and have done it since, but emergency marine work.

MR. LANDON: I do not know that I am just right in this, but I think counsel is leading the witness as to what to say.

MR. HULBERT: I do not mean to, I simply repeated what I think the doctor said.

Q. Was there any other conversation about your work, or about pay, or anything else at the time?

A. I do not recollect anything else further, at all.

Q. The man was there, injured?

A. If I may explain to the court, this was in the morning, six o'clock, there was the man sitting in my office; he was suffering awful pain; the man got up and walked and then had to lie down. I gave him something to ease his pain, morphine, the man was in very great pain; I had to get him relieved as quick as I could, and there was no bartering there.

Q. Was there any discussion about fees?

A. No, I was not in a position, having a man suffering, I was going to do that emergency work while I could. I have these cases frequently from ships and from the woods there and I never stop, I cannot stop to barter with a man about the pay. This man, you understand, had a very severe case, he was in a bad way". (Record, p. 103 to p. 106).

The same witness on behalf of the appellee, testified on cross examination in part as follows:

Q. (Mr. Landon) Now, doctor, when was the first time any one said anything to you about being paid for your services.

A. I don't know that anybody did say anything about paying for my services.

Q. Not at all;

A. No sir. The first reference to pay, if you wish me to tell you that, was when Fondahn was leaving, he left on Saturday. Fondahn had with him a hundred and some dollars which I deposited in the bank, and I told Fondahn that the way I did with these cases off emergency ships, not off government ships, that the captain or the man himself had always paid me and I gave him a receipt so that he could collect it from the company or wherever he could.

Q. Nothing else said either way about it?

A. And he had the money with him, and if he would do that it would save me a lot of trouble, and he would be closer to the people than I would, and there was not a word about it and he agreed to it.

Q. The captain did not say anything about pay, at all?

A. No sir.

Q. He gave you a permit that you knew was only good at Port Townsend?

A. He did not give me a permit as directed to me. He gave me a permit to give to Fondahn

to admit him to Port Townsend hospital. That permit had absolutely nothing to do with me.

Q. He made no arrangements with you about pay for your services?

A. No sir.

Q. The captain made no arrangements whatever?

A. Nothing whatever. The captain could not have been there at the end of the service, and as I told the man he could pay me or I would get it from the company afterwards.

Q. Now you are as sure of that as anything else that you have testified to. You remember that the captain did not make any arrangements about pay at all.

A. Made no arrangement.

Q. The captain stayed there until when?

A. I would not be positive when the captain left; I saw him the next day a couple of times.

Q. Nothing said then at all?

A. Nothing said at all." (Record p. 107 to p. 109).

The testimony of the appellant needs no explanation for the simple reason that it is the truth. But the same can not be said regarding the captain's

and Dr. Taylor's evidence.

The captain testified that he and the appellant arrived at the office of the doctor between 8 and 9 o'clock; that they had quite a talk; that he asked the doctor point blank if he was a marine doctor and he said yes; that the doctor understood the permit and that if he had have been a private doctor he would have had to offer to pay him or guarantee his payment. And he further testified "I do not remember just the circumstances but when I said goodbye to him, or something, I says now the man is in your charge and off from my hands, in your charge." (Record p. 90).

Dr. W. J. Taylor testified that it was between 5 and 6 o'clock in the morning when they arrived at his office and that the captain did not give a permit for him to act as a doctor, that he gave him a permit for Fondahn, to admit him to the Port Townsend hospital and that the permit had absolutely nothing to do with him and that he immediately took the appellant to the hospital. The doctor testified that he did not ask for the paper to be explained; that it was ridiculous to talk that way; that he knew what the paper was.

The captain's testimony comes very near being a confession. He admits that he told the doctor, "he is in your charge now and off from my hands," but he does not remember what circumstances called

for such a statement, but he thought it was just as he was leaving. Perhaps he would lead one to believe that as a parting salute and in the most friendly and humane manner he said, goodbye doctor, "he is in your charge now and off from my hands,"—adding—"in your charge."

The captain says he asked him point blank if he was a marine doctor and he said yes. The doctor says that he asked him, and he said no. Evidently the theory of the appellee's case is that the testimony of the captain should be believed and thereby exonerate him from all blame, and then disbelieve the captain's testimony and believe the doctor's and likewise exonerate him from blame. The most that can be said for their testimony is that the captain did not tell the whole truth and that the doctor gave false testimony and in so doing they deceive no one but themselves.

We have attempted to lead up to the main question in this case and that is, whether or not this appellee performed its duty to appellant in securing medical and surgical treatment such as the law demands.

The appellants testified:

"After that they took me up to the doctor's hospital and I got chloroformed, and they tried to fix my arm temporarily, as far as I knew. I got out of the chloroform and I recollect the captain was there. But I would not be respon-

sible to give evidence as to what happened. Well, two days after I was in bed, I was helpless, could not get up. The doctor came in the morning and piled my clothes there and wanted to know if I could get up off the bed. I told him no, doctor, it is impossible I cannot move. I says what is the matter, doctor, anything going wrong? He says no, and he went out. And I spoke to his brother the same day in the afternoon, and he told me the truth, he says we find out that the captain gave us a false statement about this piece of paper, and we can get no money from the Marine Hospital, and the sooner you get out of bed it will be cheaper for you. I explained to the doctor that by the marine law I was allowed to get a doctor and hospital and medical attendance. He said I don't know nothing about that, for to clear ourselves, we will have to look for the pay from you. Well, I was thinking about my arm. I could not get no more treatment, and I considered it best to get up as quick as possible. I asked the doctor, in case I got well enough to get up, how much the bill would be, and the doctor told me he would make it cheap under the circumstances, we will only charge you thirty dollars. I told the doctor I would put the money up but I would not pay the bill, I got a receipt for the money. On a Saturday, eight days afterwards, the nurses helped me up and get on my legs. I was able to walk around in there, but I could not sit down. I got to the hospital, to the Marine Hospital, and the doc-

tor asked me why I did not come there first. He says your arm is in such shape that I could not do anything with you. My arm was all festered. It took two months and five days before they could set my arm, before my arm was in condition to set. The first week I came to the Marine Hospital they took an X-ray picture of my arm, and the fore-bone had overlapped—

MR. SHORTS: I object as not the best evidence.

Q. Did you turn those X-ray pictures over to me?

A. You have them, yes; I turned them over with all my papers.

MR. LANDON: I will produce the pictures later.

Q. You may continue now.

A. The bone was overlapped and the arm contracted and it was about an inch shorter. And on the 8th of March I got operated on and they plated my arm bones together, and the arm was in such shape and so contracted the plate wont stand. The joints of the bone cave in. And the doctors themselves think there is a cave-in in one bone—

MR. SHORTS: I object to any statement as to what the doctors may think. The best evi-

dence would be the doctors themselves. I move to strike the statement and object to any further testimony along that line.

Q. What did they do to you?

A. The doctors?

Q. Yes.

A. They operated on me. They put plates in, silver plates. And the arm was contracted in such shape it would not stand it; it broke loose again and caved in.

Q. What did they do then?

A. It has been there ever since. I was in perfect physical health, for the abrasions healed up in eight days; there is nothing against me. I blamed the captain—

Q. You are still in the hospital there?

A. I am still there. From the 10th day of January. I got hurt the 3rd of January.

Q. Can you use your arm at the present time?

A. My arm for labor is permanently useless. I cannot lift nothing with it.

Q. How old are you?

A. Forty-one past, very near forty-two.

Q. What occupation have you been following?

A. Been going to sea all my life.

Q. And what wages were you earning?

A. Forty five dollars a month.

Q. Including board on the vessel, of course.

A. Yes. I want to add that I wrote twice down to San Francisco—

Q. What correspondence, if any, have you had with the owners of the ship?

A. There was through the Union a man representing me to the owners, Mr. Tennyson representing the ship's owners. The man who was I was helpless, I could not write; as far as that goes I could not write yet.

Q. Did you see the letters?

A. He showed me the letters, and told me that Tennyson was the representative of the ship.

Q. Go ahead.

A. The doctor in Port Angeles sent a letter to me and told me he wrote to the captain and explained the case to him. I never got the money. But he promised, on one condition, if I wanted to sign an agreement not to prosecute them and to get two witnesses to sign, and he gave me a typewritten sheet of paper to that effect. That is about all of my statement."

(Record p. 20 to p. 24).

Dr. P. I. Carter, surgeon in the Marine Hospital at Port Townsend, witness on behalf of the appellant testified: that when the appellant arrived in Port Townsend on the evening of January 11, 1913, that the whole arm to the shoulder was badly swollen and paining; that there was a two inch sloughing, an infection over the region of the fracture; both bones out of position and that the appellant had injuries to his side and shoulder; that he had an anterior and posterior splint completely over his arm; that the wound had a great deal of puss; that he cleaned out the wound and applied a light splint to the arm, leaving an opening over the wound, which allowed him to dress the wound every day and kept this up for sometime. Later on it was operated on the plates were applied. That appellant's exhibit "A" was taken on January 14th, 1913; that he would treat such a wound from the beginning by the open method, that is to say, a splint would have to be applied, an extension on to the arm; that if there was very much tenderness and pain, would probably wait, just dressing the wound and keep it clean and wait for about 48 hours or until the swelling subsided enough so that you can use an extension and apply splints that would give an extension on the arm and hold the bones in an apparent right position; to allow the wound to be cleaned and dressed every day without disturbing the

splints; have an X-ray taken to be sure the bones were in place; that at the time the appellant arrived he had just anterior and posterior wooden or felt splints; that Dr. Carter would have put on splints that would give him an extension and leave a window open so he could dress the wound. (Record p. 41 to p. 60).

Dr. W. J. Taylor, witness for appellee, testified that the appellant had a bad compound fracture; that he took him to the hospital and his brother and the nurse, the nurse being his brother's wife, gave him an anaesthetic; took off the bandages and his clothing connected with it and applied iodine to the wound; that the tissues about the wound were damaged and bruised; that the arm was swollen and very painful; that he used felt splints to hold it in place; that he noticed the infection on Wednesday.

“We took all this down, loosened them, cut the bandage down, if I remember rightly, that would make a hole down to the wound, and we put adhesive to hold it on the outside; I think that was on Tuesday following the Saturday, or Wednesday, I am not sure of that. It looked as though it were infected by the temperature going up, and we took the whole thing down and it was infected. Of course it was not the fracture we had to deal with at that time—we had to deal with the fracture, but the fracture was secondary to the infec-

tion.” (Record p. 97).

That after Wednesday he thought it would not be less than once a day that he dressed and disinfected the wound, (that is to say that he dressed the wound from the 8th to the 11, at which time the appellant left.)

“Q. Wound you, after examining exhibit “A” say that is the way you would treat him permanently?

A. If I knew the condition of the arm—of course you must understand that the man had gone to Townsend. The arm as shown in the picture I will swear I did not leave the bone that way. I will swear to that that I never left that bone in that condition. You can never tell me that I would leave that that way. You understand that man had been brought over to Port Townsend from me.

Q. You do not think any good doctor would leave a bone like that?

A. Certainly not.” (Record p. 116 to p. 117).

Dr. Willis H. Taylor, testified:

Q. Did any infection set up after that in this wound?

A. Yes sir.

Q. Can you tell just how long that was?

A. I do not remember definitely, no. I remember it was two or three days after that his temperature went up, which would indicate an infection.

Q. Then what was done, if you know?

A. Why, the splints were taken down and the wound cleaned up, sterile dressing applied twice a day, if I remember.

Q. Sterile dressing applied to the wound?

A. Yes sir.

Q. Applied to the wound twice a day.

A. Yes sir.

Q. Did you assist in doing that work, doctor?

A. Yes.

Q. Who else was present if you remember, that he was dressed and taken care of that way?

A. Mrs. Taylor, my wife, and Miss Peterson, I think, was the other nurse." (Record p. 126).

Mrs. Louise Taylor, wife of Dr. Willis H. Taylor, testified for appellee to the operation and that the appellant had the ordinary nurse's care of a ward patient and that they dressed the wound every day after his temperature started, after they had left him alone for two days; "then his temperature

came up and they unbound the arm and dressed it from that time on.” (Record p. 136 to p. 137).

Appellant testified, on rebuttal as follows:

“Q. I wil ask a more specific question. State whether or not Mrs. Taylor, the head nurse at the hospital treated you?

A. I only seen her about one minute all the time I was in the hospital, that was when I was chloroformed; she was the woman that chloroformed me, and after that she never was in the room with me, not one minute.

Q. State whether or not bandages were taken off from your arm?

A. There was nothing touched my arm, no splints and no bandage during the time I was in the hospital; I never seen my arm before I came to the marine hospital.

Q. From the time you went under the operation?

A. From the time I left the ship.

Q. You never saw your arm?

A. I never saw my arm until I came to the marine hospital.

Q. Was it bandaged at the time you were under chloroform—was it bandaged when you came out of the chloroform?

A. Two splints and two bandages on it, one on top of the other; that is the way it was during all of the time.

Q. State whether or not at the time you were in the hospital there, whether any of the doctors examined your arm or doctored it in any way?

A. None of the doctors touched my arm during the time I was there.

Q. Did any one?

A. No, nobody.

Q. Who was the nurse there or party in your ward—you were down below were you?

A. There was one nurse in our room, supposed to attend to us, but she had the whole hospital to attend to.

MR. HULBERT: I object to that as an expression of opinion of the witness, and wholly incompetent and immaterial.

Q. Was she in your room some of the time?

A. She was there occasionally; she never stayed in there any time.

Q. Was this down stairs where you were?

A. Downstairs in the room; two men in the room, me and Mr. McDonald, an old man.

Q. What became of him, do you know?

MR. HULBERT: I object as incompetent and immaterial.

A. He died.

Q. When did he die?

MR. HULBERT: I object as incompetent and immaterial.

A. Twelve months ago, I was told.

Q. And this other nurse, that you speak about, not doctor Taylor's wife, but the one that was in the room there, did she do the scrubbing and looking after all that?

A. Sweeping and fixing up.

Q. Do you know where she is at the present time?

A. No, I do not know where she is.

Q. Did you try to find out where she is?

A. I have been trying all over to find her; I tried to find her from Port Angeles but could not find her.

Q. When you left the hospital how did you go down to the boat?

MR. HULBERT: I object to that as being not rebuttal; it was gone into in chief and is wholly incompetent.

A. I walked down.

Q. Now then what did you do after you got on the boat.

A. I had to stand up all the time; I could not sit down without hurting my arm.

Q. State whether or not you were careful from the time you left the hospital until you got to Port Townsend hospital.

MR. HULBERT: I object to this line of testimony because it was gone into in the examination in chief, and is not rebuttal in any sense, and therefore it is incompetent.

MR. LANDON: I think I am entitled to show what he did.

A. I had my arm in splints, bandaged and in a sling; had a sling on my shoulder, a big wide towel; the arm was lying in the towel right along and I could not hurt it any way.

Q. Anything happen at all to it?

A. Nothing happened at all to it.

Q. When you were up at the hearing when Dr. Taylor and his wife testified, did you have an X-ray taken of your arm on that date?

A. Yes sir. (Record p. 139 to p. 142).

Fondahn says that his arm was not touched at the Port Angeles hospital after he came out of the chloroform. That some two days after he went there, the doctors asked him if he could get up and go to the marine hospital, later telling him that they had found out that they had been deceived by the captain regarding the permit.

The marine doctor at Port Townsend testified as to the condition of the arm at the time of the arrival of the appellant at the marine hospital, which testimony corroborates the appellant's as to the lack of treatment while at Angeles. The Townsend doctor further testified as to what treatment would have been proper under the circumstances. The doctors at Port Angeles admit that they did not touch the arm from the time he arrived, on Saturday, until the following Tuesday or Wednesday, but claim that they treated it thereafter. They admit that if the arm was in the same condition that it was at the time Exhibit "A" was taken that it did not receive proper treatment. Fondahn's and the Port Townsend doctor's testimony shows that the bones were in the same condition when Exhibit "A" was taken as they were when he left Port Angeles.

Nowhere will it be found in the testimony, we believe, any specific statement of the Port Angeles doctors as to the treatment received. True, they

generalize and say that we, or us, treated him and that they followed the regular school and so on.

It would seem that the appellant paid for exactly what he got, namely, temporary treatment on the day he arrived at the hospital and for his subsistence during the time he was there.

This man was in charge of the appellee until he arrived at the Port Townsend hospital. He obeyed all orders and followed their directions. It was their duty to provide him with proper medical care, which of course, was not done.

The following is a letter written by Dr. Taylor to the Marine Hospital at Port Townsend:

“Port Angeles, Wash., Jan. 10th, 1913.

“Surgeon-in-Charge, Marine Hospital,
Port Townsend, Wash.:

“Dear Sir: The bearer (Mr. Fondahn) is from the S. S. Holmes and was injured while at work on that boat and left off at Port Angeles and came under our care. He has an application blank for the Marine Hospital which we are inclosing. As we have no arrangement for this class we are sending him to you as soon as it is possible to move him. As we occasionally have patients from the different boats we would be glad to know if any arrangements could be made whereby we could

treat them or administer first aid. If you would send us the information regarding this matter we would be grateful.

“In regard to patient we are sending he has a compound fracture of right arm below the elbow of both radius and ulna. We took an X-ray plate of it and by what that showed it would seem that it could not be got into position without plating. Hoping to hear from you in regard to the case and in reference to acting in conjunction with the Marine Hospital Service,

“We remain yours fraternally,

“OLYMPIC HOSPITAL.

(Signed) “Per J. W. Taylor.”

(Record p. 146).

Of course the appellant was “left off at Port Angeles and came under our care.” That is exactly what happened, “unharnessing” as it does the entire defense of the appellee.

Respectfully submitted ,

DANIEL LANDON,

Proctor for Appellant.